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No. 81-523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONTAINER CORPORATION OF AMERICA,
Appellant,

v.

FRANCHISE TAX BOARD,
Appellee.

On Appeal from the Court of Appeal of the State of California

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BRIEF FOR FINANCIAL EXECUTIVES INSTITUTE AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state transgresses the constitutional reservation to the national law-making body of the power "[t]o regulate Commerce with foreign Nations" when it taxes the income of a corporation with foreign affiliates by treating the entire corporate family as a unit, combining the separate incomes of all its members, and making an apportionment of the total to determine the state's share, in contradistinction to treating separate national corporate income accounts separately save as some reallocation may be needed to prevent distortion, which is the method of income taxation adopted by the national authorities of the United States and by the United States' foreign trading partners and which represents the international norm.

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BRIEF FOR FINANCIAL EXECUTIVES INSTITUTE AS AMICUS CURIAE

INTEREST OF FINANCIAL EXECUTIVES INSTITUTE

Amicus Financial Executives Institute is the professional association of 12,000 senior financial and administrative officers of 6,000 organizations, large and small, throughout the United States and Canada. FEI's members represent a broad spectrum of commerce, trade, and industry. FEI has filed briefs as amicus curiae in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co., restored to the calendar for reargument,* No. 81-349 (O.T. 1981); *Moorman Manufacturing Co.* v. *Bair,* 437 U.S. 267, *leave to file briefs as amici curiae granted and reh. denied,* 439 U.S. 885 (1978); *Kennecott Copper Corp.* v. *State Tax Comm'n,* 409 U.S. 973 (1972); and *Chase Brass & Copper Co.* v. *Franchise Tax Board,* 400 U.S. 961 (1970).

FEI members' companies do business in more than 125 foreign countries and in each of the 50 states, including California and other states that tax on the basis of a unitary, combined-reporting method for apportioning worldwide income. In addition, FEI members' companies

are involved in pending litigation concerning the validity and application of the worldwide-combined-reporting method. Accordingly, FEI is vitally interested in the sound and informed resolution of the constitutional issues raised by appellant.

The written consent of the parties has been obtained and is being filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Container Corporation of America is a corporation organized under the laws of Delaware with its principal executive offices in Illinois. (J.A. 6-7.) Container engages in business in California and other states of the Union. In addition, during the years in question here, Container had a controlling interest in a number of subsidiaries that were organized under the laws of, and did business in, foreign countries in Western Europe and Latin America. (J.A. 7, 14-15, 30.)

California imposes upon corporations doing business within the state a franchise tax based upon net income—a state income tax. *See* Cal. Rev. & Tax. Code § 23151 (West). In accordance with governing provisions of state law, *id.* §§ 25101, 25102, 25128, the California Franchise Tax Board determined Container's tax liability in the following way. First, it concluded that Container and its foreign subsidiaries constituted a unitary business enterprise. It then computed the combined worldwide income of Container and its subsidiaries. Next, the Board calculated Container's California income by apportioning a part of this total worldwide income to the state according to a three-factor formula. Finally, it applied to the calculated California income the California tax rate. The state courts rejected Container's federal constitutional challenges to this manner of determining its California income tax and sustained the validity of the worldwide-combined-reporting method of apportionment.

California's method of worldwide-combined-apportionment is unconstitutional under the Foreign Commerce Clause. Federal authority over foreign commerce and

international relations is "exclusive and plenary" and may not be "limited, qualified, or impeded to any extent by state action." *Board of Trustees* v. *United States*, 289 U.S. 48, 56-57 (1933). No less is demanded by the history and purpose of the relevant sections of the Constitution and the necessary role of our national government in its relations with other nations. As the Court has recently affirmed:

> "Foreign commerce is preeminently a matter of national concern. . . . [T]he Framers' overriding concern [was] that the Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448-49 (1979).

Accordingly, there is a "more rigorous" standard for judging the validity of state action that impinges on foreign commerce than state action that affects only interstate commerce, *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980). Even in the absence of affirmative federal preemption, the Commerce Clause serves to protect the preeminent power of the national government over foreign commerce by ensuring "federal uniformity . . . where federal uniformity is essential. . . . [The states] may not tell this Nation or [foreign countries] how to run their foreign policies." *Japan Line, Ltd.* v. *County of Los Angeles, supra*, 441 U.S. at 448, 455.

By statute and treaty, the United States and its foreign trading partners have adopted the method of separate-source, arm's-length allocation for taxing the income of multinational entities. In essence, this method consists of determining the national or geographic source of income for each separate taxpayer and, if necessary, reallocating income between related taxpayers as if they had dealt with each other at arm's-length. By these means, priority is given to the taxing authority of the jurisdiction in which income was earned, and duplicative taxation of income is avoided. The separate-source, arm's-length method is the prevailing international norm for the taxation of multinational enterprises.

In contrast, worldwide-combined-apportionment abandons altogether the approach of separate-source accounting and arm's-length reallocation. Instead, it assumes that income cannot be accounted for by source, and it seeks to apportion to a state a part of the combined worldwide income of the separate entities engaged in a unitary business. It does not recognize the separateness of taxing jurisdictions let alone give priority to the jurisdiction where income is earned, and it virtually ensures duplicative taxation of income. Thus, worldwide-combined-apportionment is irreconcilably at odds with the international standard of separate-source, arm's-length allocation.

The worldwide-combined-apportionment method adopted by California threatens to impair federal supremacy in this area and to disturb relations between the United States and foreign countries. Indeed, a number of foreign governments have already complained to the United States about the use of worldwide-combined-apportionment. Because of the severe problems it raises—including duplicative taxation, distortion and misapportionment of income, and onerous burdens of compliance—the California tax interferes with international trade and foreign affairs and should not be allowed to stand.

ARGUMENT

A STATE'S UNITARY, COMBINED-REPORTING APPORTIONMENT OF WORLDWIDE INCOME VIOLATES THE FOREIGN COMMERCE CLAUSE BECAUSE IT DEVIATES FROM AND IS INCONSISTENT WITH THE INTERNATIONAL NORM OF SEPARATE-SOURCE, ARM'S-LENGTH ALLOCATION ADOPTED BY THE UNITED STATES GOVERNMENT AND ITS FOREIGN TRADING PARTNERS

A. The Federal Government's Authority Over Foreign Commerce and International Affairs Is Preeminent and Exclusive

Few constitutional principles are as well-established as the preeminent authority of the federal government in the area of foreign commerce and international affairs. The Constitution expressly vests in Congress the

"Power . . . To regulate Commerce with foreign Nations . . . ." Art. I, § 8, cl. 3. Likewise, the federal government, acting through the President and the Senate, has the power "to make Treaties" with foreign nations. Art. II, § 2, cl. 2. And even where the Constitution is not explicit, the foreign-affairs power of the federal government has been recognized. *See, e.g., United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-18 (1936); *United States* v. *Belmont*, 301 U.S. 324, 330-31 (1937).[1]

Concomitant with this authority conferred upon the federal government, the Constitution removes from the states the power to act in matters of international commerce and foreign relations. Thus, states are generally prohibited "without the Consent of the Congress" from laying "any Imposts or Duties on Imports or Exports," and any such duties or imposts that are allowed as "absolutely necessary for executing [a state's] inspection Laws" are expressly made "subject to the Revision and Controul of the Congress," with the revenues therefrom "for the Use of the Treasury of the United States . . . ." Art. I, § 10, cl. 2. Similarly, "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage," "enter into any Treaty, Alliance, or Confederation," or "enter into any Agreement or Compact . . . with a foreign Power . . . ." Art. I, § 10, cl. 3. These specific inhibitions underscore the majestically simple conferral on Congress of the affirmative and exclusive power to regulate commerce with foreign nations. *See, e.g., Board of Trustees* v. *United States*, 289 U.S. 48, 57 (1933).

1. *As this Court Has Recognized From the Earliest Days to the Present, the Need to Establish National Control of Foreign Trade and Other Intercourse Was a Principal Animating Reason for the Writing and Adoption of the Constitution*

The establishment of exclusive federal authority over foreign affairs, and especially foreign commerce, was a

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[1] With respect to federal authority over foreign commerce and international relations, *see also* Art. I, § 8, cl. 1; Art. I, § 8, cl. 10; Art. II, § 2, cl. 2; Art. II, § 3.

major reason for the adoption of the Constitution. As Chief Justice Marshall explained:

> "The oppressed and degraded state of commerce previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government [prior to the Constitution], contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827). *See also Cook* v. *Pennsylvania*, 97 U.S. (7 Otto) 566, 574 (1878); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283 (1976).

At the time of the Convention, "the major concern was with extranational traffic, with only incidental and minor regard to interstate commerce. . . . [T]he major preoccupation [regarding trade and commerce] was with foreign trade and . . . the power over interstate commerce, while coordinate in expression, was distinctly secondary in scope and intended operation." Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 465, 469 (1941), *cited with approval in Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 n.12 (1979). *See also* 1 Watson, *The Constitution of the United States* 479-80, 483 (1910); *cf. Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874).

The records of the adoption of the Constitution confirm the central importance of the establishment of federal authority over commercial and diplomatic relations with foreign governments. *See generally* 1 Beveridge, *The Life of John Marshall* 304-05, 308-12 (1916); Farrand, *The Framing of the Constitution of the United States* 5-12 (1913); Swisher, *American Constitutional Development* 25-27 (2d ed. 1954); Warren, *The Making of the Constitution* 567-90 (1937). *The Federalist Papers* reflect that importance. Madison thought that "[t]he powers delegated by the proposed Constitution to the Federal Government . . . will be exercised principally on external objects, as war, peace, negociation, and foreign commerce." *The Federalist* No. 45, at 313 (J. Cooke ed. 1961). As Madison observed, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations. . . . The regulation of foreign commerce . . . [is] properly submitted to the federal administration." *The Federalist* No. 42, at 279, 281 (J. Cooke ed. 1961). Hamilton also recognized the importance of this matter. He said that "[t]he want of a power to regulate commerce is by all parties allowed to be" one of "the defects . . . in the existing Federal system . . . which concur in rendering it altogether unfit for the administration of the affairs of the Union. . . . It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a Federal superintendence." *The Federalist* No. 22, at 135-36 (J. Cooke ed. 1961). Without federal superintendence, he went on,

> "[n]o nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them . . . [because t]he treaties of the United States, under the present constitution, are liable to the infractions of thirteen different Legislatures . . . ." *Id.* at 136, 144. *See also id.*, No. 11, at 65 (Hamilton).

2. *This Court Has Recognized the Paramount Role of the National Government in International Matters, Including Foreign Trade, as an Outgrowth of the Nation's Constitutional History*

Consistent with our federal system of government and the history and intendment of the Constitution, this Court has long recognized the paramount role of the national government in international affairs:

> "[T]he supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by the authors of the Federalist in 1787, and has since been given continuous recognition by this Court . . . . The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines* v. *Davidowitz*, 312 U.S. 52, 62, 63 (1941).[2]

What was said in general terms in *Hines* v. *Davidowitz* of the preeminence of federal power in international affairs is true in particular regard to the federal power over foreign commerce. We have quoted above from *Board of Trustees* v. *United States*, 289 U.S. 48, 56-57 (1933), the Court's forceful comment that the national power over foreign commerce is "exclusive and plenary" and "may not be limited, qualified or impeded to any extent by state action." The Court went on there to say:

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. . . . [This] single con-

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[2] *See also, e.g.*, Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734, 754, 758 (1978); Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); United States v. Pink, 315 U.S. 203, 232-34 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889); United States v. Arjona, 120 U.S. 479, 483 (1887).

trol . . . [of foreign commerce] was one of the dominant purposes of the Constitution to create." *Id.* at 59.[3]

For this reason, as the Court recently noted, "[t]he States . . . are subject to limitations on their taxation powers that do not apply to the Federal Government." *F.W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, No. 80-1745 (U.S. June 29, 1982), slip op. 8. And the Commerce Clause of its own force protects the paramount authority of the national government to regulate commerce even though the federal power has not been affirmatively exercised by the Congress or the Executive to limit the actions of the states. *See, e.g.*, *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (plurality opinion); *Merrion* v. *Jicarilla Apache Tribe*, 102 S. Ct. 894, 910 (1982).

The broad federal authority over foreign commerce and international affairs reflects the realization that "[i]n this vast external realm" the Nation is confronted with "important, complicated, delicate and manifold problems . . . ." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936). The problems can only be exacerbated if states are allowed to chart their own course. As Hamilton cautioned, *The Federalist* No. 80, at 536 (J. Cooke ed. 1961), foreign powers have no special regard for our federal system and will hold the national government accountable for what the states do. In the context of disabling states from acting in foreign affairs, this Court has described the potential results of the accountability of the national government for the wrongs of member states. It has said that "'[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted,

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[3] *See also, e.g.*, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976); County of Mobile v. Kimball, 102 U.S. (12 Otto) 691, 696-97 (1880); Inman Steamship Co. v. Tinker, 94 U.S. (4 Otto) 238, 245 (1876); Chy Lung v. Freeman, 92 U.S. (2 Otto) 275, 280 (1875).

or permitted, by a government.'" *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968), *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941). And if there should arise

> "a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? . . . [T]he power to regulate commerce with foreign nations . . . belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung* v. *Freeman*, 92 U.S. (2 Otto) 275, 279, 280 (1875).

It is natural, then, given the significance of the foreign commerce power to the adoption of the Constitution, the greater importance of foreign commerce than that of interstate commerce at the time the Nation was founded, and the recognition of the paramount authority of the federal government in all foreign affairs, that Commerce Clause inhibitions on state action are "more rigorous when a restraint on foreign commerce is alleged than when all that is involved is an interference with interstate commerce." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980).

3. *This Court in* Japan Line *Reaffirmed and Applied the Principles of Exclusive National Competence in Foreign Trade Matters in Invalidating a State Tax That Resulted in Taxation Duplicative of That of a Foreign Nation and Impaired the Ability of the United States to Speak With One Voice in Regulating Commercial Relations With Foreign Governments*

The issue in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), was the validity of a California county's fairly apportioned tax on its small, transient share of the value of Japanese cargo containers that were used in international trade. The Court assumed that such a tax on containers in interstate commerce would have been constitutional, 441 U.S. at 445, 451. But the mere fact that Los Angeles County's tax was fairly proportional to the length of the containers' stay in the county was not enough to save it under the For-

eign Commerce Clause as it would have had only interstate commerce been involved. The duplication, however insignificant in amount, mattered in principle because "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.* at 456. The Court emphasized that "[f]oreign commerce is preeminently a matter of national concern," and that, "[a]lthough the Constitution . . . grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Id.* at 448.

The *Japan Line* Court noted that the greater scope of the foreign commerce power—equivalent to the "more rigorous" standard of *Reeves, Inc.* v. *Stake, supra*—implicates at least two considerations in foreign commerce tax cases unique to them as opposed to interstate commerce tax cases. 441 U.S. at 446. One is the enhanced risk of double taxation that results from the inability of this Court or any other tribunal to ensure that, to take the example then at hand, other jurisdictions capable of taxing the containers would defer to Los Angeles County's fairly apportioned tax. *Id.* at 447, 454. The other is the necessity of barring exertions of state taxing power that would prevent "the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Id.* at 451, *quoting Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976).

The fairly apportioned Los Angeles County tax both resulted in double taxation and prevented the Nation from speaking with one voice in regulating foreign commerce.

It resulted in double taxation because Japan—as was its right under the custom of nations as the country of domicile—taxed the containers on their full value with no allowance for even the most fairly apportioned tax

levied by some jurisdiction through which they passed. 441 U.S. at 447, 451-52, 454.

The Los Angeles County tax also prevented the United States from speaking with one voice to interested foreign powers. The United States and Japan were parties to a customs convention on containers, which "reflect[ed] a national policy to remove impediments" to international traffic and under which American containers were not taxed in Japan. *Id.* at 453. The Court found that in these circumstances "California's tax . . . will frustrate attainment of federal uniformity." *Ibid.* For one thing, the local tax on the containers "creates an asymmetry in international maritime taxation operating to Japan's disadvantage." *Ibid.* The Court went on:

> "The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole. If other States follow California's example (Oregon already has done so), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make 'speaking with one voice' impossible. California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.*

The Customs Convention, it should be noted, applied only to federal and not to state taxes and therefore did not by its own force invalidate the California tax. *Id.* at 446 n.10. It was the prohibition, residing in the Commerce Clause, of state action that prevents the nation from speaking with one voice in matters of foreign trade that invalidated the Los Angeles County tax. The Court made clear that in this area the absence of express federal preemption of action by the states does not leave the states at liberty to act.

> "We find no merit in th[e] contention . . . that a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation. . . . California may

not tell this Nation or Japan how to run their foreign policies." *Id.* at 454-55.

B. Because It Deviates From the International Norm of Separate-Source, Arm's-Length Allocation Adopted by the United States and Other Nations, California's Worldwide-Combined-Reporting Method of Apportionment Violates the Foreign Commerce Clause

The California worldwide-combined-reporting method of apportionment is unconstitutional under the Foreign Commerce Clause.[4] Congress, by statute and treaty, has adopted a different method—the separate-source, arm's-length allocation method—that accords with the custom of nations and is inconsistent with the use of the world-wide-combined-reporting method by any of the states. California's method, moreover, results in double taxation and has other conceptual and practical flaws that aggravate the interference it works with federal regulation of international commerce.

1. *Congress Has Provided in the Relevant Provisions of the Internal Revenue Code for Separate-Source, Arm's-Length Taxation of Multinational Income*

The United States, like other nations, rests its jurisdiction to levy the national income tax on the domicile of the taxpayer and, where a domiciliary connection with the United States is lacking, on the fact that the source of the taxpayer's income is in the United States. *See, e.g.*, 2 Bittker, Emory, & Streng, *Federal Income Taxation of Corporations and Shareholders* (*Forms*) 17-3 to 17-4 (rev. ed. 1982); Thompson, *Federal Income Taxation of Domestic and Foreign Business Transactions* 512-14 (1980). Thus, natural persons who are citizens or permanent resident aliens and corporations that owe their existence to the laws of the United States or any of the states are obliged to pay tax to the United States on their

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[4] Because the California tax violates the Foreign Commerce Clause, it is unnecessary for the Court to decide whether it also offends the Due Process Clause. *See* ASARCO, Inc. v. Idaho State Tax Comm., No. 80-2015 (U.S. June 29, 1982), slip op. 20 n.14 (O'Connor, J., dissenting).

income whatever its geographical source. Non-resident aliens and foreign corporations that derive income from the United States are also subject to the federal income tax but only to the extent that their income does indeed find its source in the United States. In parallel fashion, foreign jurisdictions tax the income earned within their borders, including the foreign-source income of American corporations or foreign subsidiaries of American companies. Finally, to ensure that our domiciliaries are not penalized by the source-based taxing systems of other nations, the familiar foreign income tax credit provisions allow the domestic corporation that does business abroad —to take the most typical example and the relevant example for purposes of this case—to credit any taxes paid to foreign countries in respect of "income from sources without the United States" against what would otherwise be its United States income tax liability.

That description summarizes—and no doubt oversimplifies—many pages of technical provisions of the Internal Revenue Code. But it captures, we believe, the essence of separate-source income taxation, the system of income taxation that, in the interest of comity, of the security of multinational enterprises, and thus ultimately of world economic development, is pursued almost everywhere the world round.[5]

We elaborate only so far as necessary to provide authority for what we have just outlined by way of summary.

As this Court has said, "domestic corporations are required to pay a tax on their incomes from all sources." *National Paper & Type Co.* v. *Bowers*, 266 U.S. 373, 376 (1924). *See also* Bittker, Emory, & Streng, *supra*, at 17-4; Thompson, *supra*, at 512; 3 Bittker, *Federal Taxa-*

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[5] *See* Thompson, *supra*, at 557, *quoting* Draft Double Taxation Convention Report of the O.E.C.D. (1963); *Tax Conventions with Belgium, Finland, Trinidad and Tobago, and the Netherlands: Hearings Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 2 (1970) (statement of then Assistant Secretary of the Treasury Edwin S. Cohen).

tion of Income, Estates and Gifts ¶ 65.1, at 65-2 (1981). The rule, however, is subject to the allowance of a credit for taxes paid to foreign jurisdictions on income from sources without the United States. 26 U.S.C. §§ 901 *et seq.* The credit is also of long standing. This Court explained in a leading case that "the primary design of the [credit] provision was to mitigate the evil of double taxation" resulting from the overlapping jurisdiction of the United States and foreign countries to tax. *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 7 (1932); *see also id.* at 8-10 nn.6, 7; *American Chicle Co.* v. *United States*, 316 U.S. 450, 451 (1942); *Associated Tel. & Tel. Co.* v. *United States*, 306 F.2d 824, 832 (2d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963). The Senate Committee on Finance more recently has explained that the "foreign tax credit system embodies the principle that the country in which a business activity is conducted . . . has the first right to tax the income arising from" that activity even if it is conducted by a company resident in another country. S. Rep. No. 94-938, 94th Cong., 2d Sess. 233 (1976). The country where the company resides "has a residual right to tax the income arising from" the activity in another country, but the country of the corporation's residence "recognizes the obligation to insure that double taxation does not result." *Ibid.* The United States uses the tax credit to satisfy that obligation by ensuring that income is taxed initially according to its source.

Foreign corporations "are ordinarily not taxed [in the United States] on their foreign-source income . . . ." Bittker, Emory, & Streng, *supra*, at 17-3. The Congress has defined "domestic" corporations and "foreign" corporations. 26 U.S.C. §§ 7701(a)(3), (5). Moreover, it has established source-of-income and source-of-deduction rules, 26 U.S.C. §§ 861-63, which determine "[t]he geographical source" of income and deductions, Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 17.02, at 17.09 (4th ed. 1979). By these rules, the foreign-source income of foreign corporations is distinguished from their United States-source income and

left to be taxed by the appropriate foreign jurisdiction. Thompson, *supra*, at 514. Thus, because the United States defers to the source jurisdiction's taxation of the foreign-source income of foreign corporations, inconsistent treatment and multiple taxation are avoided. These rules apply even if the foreign corporation is "wholly owned by U.S. shareholders." Bittker, Emory, & Streng, *supra*, at 17-3. It is only when "the foreign income is repatriated in the form of dividends to U.S. shareholders" that "it will be subjected to U.S. taxation . . . ." *Ibid.* And in that event, the United States allows, in accordance with the credit provisions already discussed, "a credit for foreign income taxes . . . paid when the income was earned in the foreign jurisdiction." *Ibid.*

The separate-source system, then, is quite simple. It is complicated only by the fact that the geographical source of income earned by a multinational enterprise is not always self-evident.

To protect the integrity of the source rules for taxing income, Section 482 of the Code authorizes the Internal Revenue Service to reallocate income between two or more entities owned or controlled by the same interests if "necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such [entities]." 26 U.S.C. § 482. *See Commissioner* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 400 (1972). When any reallocation has to be made, it is done by treating the commonly owned or controlled entities as if they had dealt with each other at arm's length. As explained in the Treasury regulations implementing Section 482:

> "The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer. . . . *The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.*" Treas. Reg. § 1.482-1(b)(1) (emphasis added).

Arm's-length reallocation pursuant to Section 482 is authorized in "any case in which either by inadvertence or design the taxable income, in whole or in part, of a controlled taxpayer, is other than it would have been had the taxpayer in the conduct of his affairs been an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." Treas. Reg. § 1.482-1(c). The obvious case, and the case where the IRS has employed Section 482 most extensively in recent years, is that of a foreign corporation selling products to an affiliated domestic corporation at spurious prices that result in larger profits abroad, thereby producing smaller profits and smaller taxable income in the United States. *See* 3 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 79.1, at 79-2 (1981).

2. *In Treaties as Well as in the Internal Revenue Code, the National Government Has Committed Itself to Separate-Source, Arm's-Length Accounting for Income Tax Purposes*

In addition to their inclusion in the Internal Revenue Code, the two fundamental standards of federal taxation of multinational enterprises—(1) avoidance of multiple taxation by deference to the taxing authority of the jurisdiction where the income originated (geographical-source allocation), and (2) where necessary, arm's-length reallocation to determine the true income for commonly controlled taxpayers (arm's-length accounting)—are also embodied in international tax treaties. They are the standards of the tax treaties between the United States and its trading partners, such as Canada, France, Germany, Italy, Japan, and the United Kingdom.[6]

The Treasury Department's Model Income Tax Treaty "for the Avoidance of Double Taxation and the Preven-

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[6] *See* 1 CCH Tax Treaties, *e.g.*, ¶ 1203 (Canada) (*see also* ¶ 1301); ¶ 2803 (France); ¶ 3003 (Germany); ¶ 4303 (Italy); ¶ 4393 (Japan); 2 CCH Tax Treaties ¶ 8103A (United Kingdom).

Appellant has stated that the arm's-length method was used in those foreign countries in which its subsidiaries operated. *See* J.S. 8.

tion of Fiscal Evasion With Respect to Taxes on Income and Capital" provides that business profits arising in a foreign country may be taxed in that country and that the domiciliary country of the taxpayer will not impose a second tax on that income. 1 CCH Tax Treaties ¶ 158, at 257 (Art. 7), 263 (Art. 23) (1981). The Treasury Model Treaty, having thus described the separate-source method, goes on to describe the arm's-length reallocation: for "associated enterprises" between which "conditions are made or imposed . . . in their commercial or financial relations which differ from those which would be made between independent enterprises, . . . any profits which, but for those conditions would have accrued to one of the enterprises, but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly." *Id.* at 258 (Art. 9). *See also id.* at 257 (Art. 7). Similar provisions are also contained in the "Model Convention for the Avoidance of Double Taxation With Respect to Taxes on Income and Capital" of the Organization for Economic Co-operation and Development (of which the United States is a member)[7] and in the United Nations "Model Double Taxation Convention Between Developed and Developing Countries."[8]

In view of the foregoing, it is clear that separate-source, arm's-length allocation is the prevailing international norm adopted by the United States and its international trading partners. As Assistant Secretary of the Treasury Woodworth explained:

> "The Federal Government and virtually all other governments in the world determine taxable income on the basis of what are arm's length transactions in dealings between related companies. This is the general rule.
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> [T]he arm's length rule is generally applicable in the world today . . . . [It is] the general rule with

[7] 1 CCH Tax Treaties ¶ 151 (1980).

[8] 1 CCH Tax Treaties ¶ 171 (1982).

> which [other countries and companies of other countries] are acquainted [and is] used by the Federal Government. . . .
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> • • • • •
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> [T]he Federal Government, and practically all of the rest of the world, uses the arm's length procedure." [9]

3. *California's Worldwide-Combined-Apportionment Method Results in Duplicative Taxation and Is at Odds With the Method of Allocating Income for Income-Tax Purposes Used by the United States and its Trading Partners in the International Community*

In the face of this international acceptance of the separate-source, arm's-length method, California's unitary, combined-reporting apportionment of worldwide income cannot be allowed to stand. Like Los Angeles County's fairly apportioned property tax, it must be condemned under the Foreign Commerce Clause because it "impair[s] federal uniformity in an area where federal uniformity is essential" and "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448, 451 (1979).

The California method of apportionment includes the earnings of foreign subsidiaries in the combined worldwide total of income to be apportioned. The result is to impose a tax on income that has already been taxed by

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[9] *Tax Treaties with the United Kingdom, the Republic of Korea, and the Republic of the Philippines: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 20-21, 24 (1977); *See also id.* at 33, 105; *State Taxation of Interstate Commerce and Worldwide Corporate Income: Hearings on S. 983 and S. 1688 Before the Subcomm. on Taxation of the Senate Comm. on Finance*, 96th Cong., 2d Sess. 44 (1980) (statement of then Assistant Secretary of the Treasury Donald C. Lubick); *State Taxation of Foreign Source Income: Hearings on H.R. 5076 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 4, 5, 7, 9 (1980) (statement of Assistant Secretary Lubick).

the source jurisdiction abroad on an unapportioned, full-value basis. (*See* pp. 14, 16 *supra.*) Thus, as in *Japan Line, Ltd.* v. *County of Los Angeles*, *supra*, a second tax on the identical income "inevitably results . . . if a State should seek to tax . . . [that foreign-source income] on an apportioned basis," 441 U.S. at 447, and this is true even though the state tax is " 'fairly apportioned,' " *id.* at 448.[10]

Nor can it be said—recognizing that the duplication is likely to be of the greatest concern to the other members of the international community when a foreign parent's income is attributed to a California subsidiary—that this duplicative tax is of no concern to the foreign-source country even in the case of a United States parent with a foreign subsidiary. In comparison to separate-source accounting, California's method of taxation will discourage foreign investment by United States companies and make it less likely that they will establish foreign subsidiaries. Consider an example in which no arm's-length adjustment is needed between a domestic parent and its foreign subsidiary because the intrafamily transfer prices fairly approximate arm's-length prices.[11] If the unitary, combined-reporting system attributes to California an amount of foreign-source income that has been fully taxed by the foreign jurisdiction, then this duplicative tax by the state will require the overall operation of the parent and subsidiary to be more profitable than it would have to be under the separate-source method in order to produce the same total after-tax income. Such a disincentive to United States investment abroad, as a conse-

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[10] In this case, appellant's foreign subsidiaries paid taxes in the foreign countries on the amounts earned in each country (J.A. 72). Nevertheless, California "attribute[d] to other countries approximately one-half of the income produced in Colombia and Venezuela according to arm's-length principles applied in those countries" (J.S. 11).

[11] In this case, the Internal Revenue Service audited Container for the years in question here. It accepted Container's income figures as accurate and proposed no adjustments to income or deductions under § 482. (J.A. 78-79.)

quence of the application of the combined-reporting method instead of the separate-source standard, would surely be of considerable importance to foreign governments. And any repatriation of funds to the United States necessary to satisfy the duplicative state tax could well interfere with the internal policies of foreign-source countries in such areas as the development and retention of capital for local reinvestment by the subsidiary itself or by foreign minority shareholders.[12]

Beyond duplication of tax is the effect of the California method in preventing the United States from speaking with one voice. The "custom of nations," 441 U.S. at 447, 454, in this area—deviated from only by the world-wide-combined-reporting states[13]—is to avoid overlapping or duplicative taxation of the same income by according priority to the jurisdiction that is the source of income and reallocating income, when required to avoid distortion, on an arm's-length basis. In essence, this approach rests on the determination of the geographic source of income for each separate taxpayer and, if necessary, the arm's-length readjustment of income between related taxpayers.

In contrast, the central premise of unitary, combined-reporting apportionment is that most "income . . . cannot be satisfactorily allocated by source," J. Hellerstein & W. Hellerstein, *State and Local Taxation* 399 (4th ed. 1978)—in other words, "the impossibility of allocating specifically the profits earned by the processes conducted within [the state's] borders," *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 121 (1920). Under this system, the worldwide business income of the entire multinational unitary enterprise is combined in a single total

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[12] We note that a substantial number of appellant's overseas subsidiaries had foreign minority stockholders—in some cases as much as 33% of total ownership. (J.A. 7, 14-15.)

[13] FEI estimates that approximately 10 states have adopted a system of worldwide-combined-apportionment. *Compare* Japan Line, Ltd. v. County of Los Angeles, *supra*, 441 U.S. at 453 & n.19.

and then apportioned to California according to a three-factor formula, that is, according to how much the California part of the enterprise represents of its total property, payroll, and sales. (*See* J.S. App. A6 n.2.) It is thus apparent that California's unitary, combined-reporting apportionment of worldwide income is irreconcilably at odds with the international standard of separate-source allocation. As the Court observed in *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 444-45 (1980), "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained." The Court held that specific allocation was not constitutionally preferred in the circumstances of that case. Here it must be preferred because state unitary taxation of worldwide income "is not ceding the primacy of foreign source income . . . to the foreign government." *State Taxation of Foreign Source Income: Hearings on H.R. 5076 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 10 (1980) (hereinafter *Foreign Source Income Hearings*) (statement of then Assistant Secretary of the Treasury Donald C. Lubick).

Moreover, California's method "creates an asymmetry in international . . . taxation," 441 U.S. at 453, that threatens to impair federal supremacy in this area and to disturb relations between the United States and foreign countries. As Assistant Treasury Secretary Woodworth noted, "it becomes very disconcerting for other countries and for companies of other countries doing business in the United States to have the general rule [of separate-source accounting] with which they are acquainted used by the Federal Government and to find that certain State governments do not follow that rule. . . . [I]t is important that we all use the same test." *Tax Treaties with the United Kingdom, the Republic of Korea, and the Republic of the Philippines: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 21, 24 (1977) (hereinafter *Tax Treaties Hearings*);

see also id. at 33. In fact, the state "practice has created, and continues to create, an irritant in the international relations of the United States. A number of foreign governments have complained, both officially and informally, that the unitary system differs from the arm's-length method which is used by the Federal Government and is generally accepted in international practice." *State Taxation of Interstate Commerce and Worldwide Corporate Income: Hearings on S. 983 and S. 1688 Before the Subcomm. on Taxation of the Senate Comm. on Finance*, 96th Cong., 2d Sess. 44 (1980); *see also Foreign Source Income Hearings* 5, 7 (statement of Assistant Secretary Lubick).[14]

We recognize, of course, that the problems caused by worldwide-combined-apportionment are exacerbated in the case of a foreign parent corporation with a domestic subsidiary doing business in California. But application of the California tax even to a domestic parent and its foreign subsidiaries, which is what this case involves, interferes with the federal government's authority over international trade and diplomatic affairs and therefore is unconstitutional under the Foreign Commerce Clause.[15]

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[14] The background and details of these protests by foreign governments are set out in the Brief for Appellant (at 23-28) and the Memorandum for the United States as Amicus Curiae (at 16-17) in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., No. 81-349 (O.T. 1981).

[15] In addition, to create a special rule that discriminates against domestic companies in favor of foreign organizations would be a misguided construction of the Constitution, since the Commerce Clause "cannot be read to accord . . . [foreign entities] preferential treatment." Michelin Tire Corp. v. Wages, *supra*, 423 U.S. at 287. *See also* Maryland v. Louisiana, 451 U.S. 725, 754 (1981) (the Commerce Clause contains an "antidiscrimination principle [which] 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of free commerce anticipated by the Constitution").

4. *The Flaws That Inhere in the Worldwide-Combined-Apportionment Method Underscore Its Constitutional Impermissibility*

California, one may concede, is seeking only to tax its fair share of the income of Container Corporation and other companies that do business both in California and in foreign lands. Within the community of the states of the Union, the method it has chosen, we may assume, would be a permissible one because any distortions it would yield are likely to be within tolerable bounds and this Court sits to ensure that California and its sister states do not unduly burden or discriminate against businesses that operate across state lines. In this case, however, the Court's writ runs only to California and not to the nations whose taxing systems would have to be accommodated to California's if the California system were allowed to stand.

Moreover, the distortions that system yields, when applied beyond the borders of the United States, far exceed tolerable limits. The California method, in short, cannot be defended on the ground that, though different from the federal and the international system, it comes out at about the same place. The California method is not calculated to produce a fair or reasonable result when applied to income earned abroad.

Worldwide-combined-apportionment is impermissibly susceptible of seriously distorting the income attributed to the jurisdiction using the method. "The underlying premise of formulary apportionment under the . . . three-factor formula is that . . . , by and large, every dollar of wages or property spent in one taxing jurisdiction, along with receipts from sales in the area, will produce the same amount of profit in all taxing jurisdictions." J. Hellerstein & W. Hellerstein, *supra*, at 539. As the Treasury Department has correctly pointed out, "[i]mplicit in the unitary system is the assumption that profit rates in different units of a corporate family, engaged in different activities and in different locations, are always

the same." *Tax Treaties Hearings* 34 (statement of Assistant Secretary Woodworth).

Whatever the validity of formula apportionment within the largely-homogeneous United States, this approach is unsound and arbitrary in the international context.[16] As Assistant Treasury Secretary Woodworth explained, it is

> "clearly not the case [that multinational profit rates are the same]. And when it is not the case, the unitary system will misallocate income. Whenever profit rates are higher in foreign affiliates than in domestic activities, the unitary system allocates too much income to the domestic member or members of the group. The result is tantamount to taxation by a state government of the foreign income of a foreign corporation." *Tax Treaties Hearings* 34; *see also id.* at 21, 24; J. Hellerstein & W. Hellerstein, *supra*, at 539; H.R. Rep. No. 1480, 88th Cong., 2d Sess. 168 (1964); *State Taxation of Interstate Commerce: Hearings Before the Subcomm. on State Taxation of the Senate Comm. on Finance*, 93d Cong., 1st Sess. 160 (1973) (statement of Professor Jerome R. Hellerstein).[17]

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[16] In the context of interstate commerce, "a State may apply an apportionment formula to the taxpayer's total [unitary] income in order to obtain a 'rough approximation' of the corporate income that is 'reasonably related to the activities conducted within the taxing State.'" Exxon Corp. v. Wisconsin Department of Revenue, 447 U.S. 207, 223 (1980). In the case of foreign commerce, however, "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 (1979).

[17] *See also GAO Report on Determining the Income of Multinational Corporations*, App. IX, at 93 (Sept. 30, 1981) (letter from Assistant Secretary of the Treasury John E. Chapoton) ("formula apportionment has little merit because a corporation could have an increased tax burden merely as a result of its affiliates becoming more profitable or as a result of paying higher wages in the jurisdiction applying the formula").

Such a misapportionment of worldwide income can occur for any reason that causes the overseas operations to be more profitable than domestic operations. One well-recognized example is the significant disparity around the world in wage rates and payroll costs—one of the factors employed in California's apportionment formula. Once again, this has been acknowledged by the Treasury Department:

> "[L]abor costs vary substantially among countries—very much more so than among regions in the United States . . . . [The foreign] labor cost element in the formula will probably be lower than the California labor cost. A disproportionate amount of income will be apportioned to California." *Tax Treaties Hearings* 34 (statement of Assistant Secretary Woodworth).

Indeed, the record in the instant case clearly proves this defect in worldwide apportionment. It was demonstrated below that Container's overseas businesses were more profitable than its United States business. (*See* J.S. 18-19.) Expert testimony also illustrated the reasons why corporate operations abroad are in general more profitable than domestic operations. (*See* J.S. 19-20.) And, with particular regard to wage rates, Container showed that its "workers in California are paid 2½ times the amount paid to workers in Colombia to produce the same quantity of . . . containers" (J.S. 18), that worldwide wage rates vary widely and that wage rates in the United States exceed those in other countries (J.S. 18 & n.11; J.S. App. A41-A42), and that in 1969-70 the average hourly worker compensation in *developed* countries, *as adjusted for differences in productivity*, was only 40 to 82 percent of the average hourly compensation in the United States (J.S. 18 & n.11; J.S. App. A43).

Such misapportionment is objectionable on several grounds. As Assistant Treasury Secretary Woodworth observed, it allows the state effectively to tax the foreign-source income of a foreign corporation over which the state would not otherwise have jurisdiction. It also is

manifestly unfair to the domestic taxpayer to be required to pay taxes on the foreign-source income of a separate corporate entity. And, of particular significance for purposes of the Foreign Commerce Clause, it discourages American investment in countries in which the profitability rate is significantly different than in the United States and thereby discriminates against those countries (generally the developing countries) in favor of nations (generally the industrialized nations) where profitability is more comparable to that in the United States.

Furthermore, worldwide-combined-apportionment raises insurmountable problems of application. It requires that corporate books and records from all over the world be converted from foreign currencies and accounting practices into United States dollars and accounting conventions. The burden of such an undertaking can be enormous,[18] and the results of the conversion are often, at best, arbitrary and inexact. *See* J. Hellerstein & W. Hellerstein, *supra*, at 539; *Tax Treaties Hearings* 34 (statement of Assistant Secretary Woodworth). In fact, the record in this case discloses that "[a]ccounting procedures and methods [for Container and its foreign subsidiaries] were far from standardized . . . . The books and records of the foreign subsidiaries are kept in accordance with the generally accepted accounting principles, if any, of the country in which the subsidiary is located. These accounting principles may vary in material respects from generally accepted accounting principles in the United States." (J.A. 40, 72. *See also* J.S. App. A29.)

Undoubtedly, of course, foreign subsidiaries already supply some information to their domestic parent in a form in which these conversions have been made. But

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[18] *See Tax Treaties Hearings* 105 (letter from Secretary of the Treasury Blumenthal). Moreover, because of foreign laws prohibiting or restricting the disclosure of certain information, it is sometimes not possible to provide the information required by the taxing state. *Ibid. See also Tax Treaties Hearings* 213 (statement of Valentine Brookes) (United Kingdom Official Secrets Act).

that process—which certainly varies for each company—is a far cry from the detailed and voluminous material on property, payroll, and sales necessary for California to apply its method of worldwide-combined-apportionment. Moreover, under the theory that the separate corporations are part of a unitary business enterprise, the combined-reporting system eliminates all intra-enterprise dealings and transactions between these entities. *Cf. ASARCO, Inc.* v. *Idaho State Tax Comm.*, No. 80-2015 (U.S. June 29, 1982), slip op. 5; *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 441 n.15 (1980). To effect the required elimination would impose on a taxpayer an extraordinary burden, well beyond anything corporations usually do in the ordinary course of business.

For all these reasons, the worldwide-combined-reporting method of apportionment violates the Foreign Commerce Clause.[19] Congress, we may assume, could authorize the states to apply worldwide-combined-apportionment—despite its inconsistency with Congress' own chosen method and despite its inherent defects—for "Congress, if it chooses, may exercise [its Commerce Clause] power . . . by conferring upon the States an ability to restrict the flow of . . . commerce that they would not otherwise

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[19] The validity of the California tax is not saved by the decision of this Court in Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U.S. 271 (1924). *Bass* presented no conflict between state apportionment of worldwide income and the international norm of separate-source, arm's-length accounting, since it was not until "1934 [that] the Department of the Treasury adopted the 'arm's length standard' for allocating income." *GAO Report on Determining the Income of Multinational Corporations*, at 2 (Sept. 30, 1981). The ensuing development of tax treaties and the international acceptance of the arm's-length method that now prevails make the instant case a much different one than *Bass*. Moreover, *Bass* was "controlled," 266 U.S. at 280, by the decision in Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920), which involved the apportionment of interstate income; but as the Court has now held (*see* pp. 10, 11, 25 n.16 *supra*), a more rigorous test is applicable to foreign commerce than to interstate commerce. Finally, unlike the instant case, the taxpayer in *Bass* had "not even attempted to show," 266 U.S. at 282, any misapportionment of income.

enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). *See also New England Power Co.* v. *New Hampshire*, 102 S. Ct. 1096, 1101 (1982); *ASARCO, Inc.* v. *Idaho State Tax Comm., supra*, slip op. 20 n.14 (O'Connor, J., dissenting). But, "[i]f there are to be such restraints, they must be provided by the Federal Government." *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). Unless and until Congress grants this authority, the states may not depart from the international norms of commerce recognized by the United States and its trading partners.

CONCLUSION

The California method of unitary, combined-reporting apportionment of worldwide income is unconstitutional under the Foreign Commerce Clause. Accordingly, the judgment below should be reversed.

Respectfully submitted.

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